

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

ROBERT C. PEWTRESS, JR.)	
Claimant)	
VS.)	
)	Docket No. 222,574 & 222,575
PREMIER WINE AND SPIRITS)	
Respondent)	
AND)	
)	
MARYLAND CASUALTY COMPANY)	
Insurance Carrier)	

ORDER

Claimant appeals the preliminary hearing Order entered by Administrative Law Judge Bryce D. Benedict dated May 27, 1997, wherein the administrative law judge denied claimant temporary total disability compensation and medical treatment, finding claimant's injury to be noncompensable.

ISSUES

On appeal, claimant raises the following issues for consideration:

1. Whether claimant provided notice of an alleged back injury within ten days as required by K.S.A. 44-520.
2. The constitutionality of K.S.A. 44-520.
3. Whether claimant proved he suffered accidental injury.
4. Whether claimant's accidental injury arose out of and in the course of his employment with respondent.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Claimant's Application For Review was filed June 5, 1997. On June 26, 1997, Claimant's Memorandum In Support of Appeal and Motion For Stay was filed, requesting this matter be stayed until such time as the Kansas Supreme Court issues its decision in Injured Workers of Kansas, et al., vs. Wayne L. Franklin, Secretary of Human Resources and Philip S. Harness, Director of Workers Compensation, Case No. 77,561.

On July 21, 1997, the opinion of the Kansas Supreme Court was filed finding K.S.A. 44-520 did not violate either the equal protection or due process clauses of the Kansas Constitution. As such, claimant's appeal of that issue is dismissed and claimant's motion to stay the Appeals Board decision is rendered moot.

With regard to the remainder of claimant's contentions, claimant alleges multiple injuries against respondent with injuries to his knee, neck and back. The administrative law judge found insufficient evidence to prove claimant's knee injury arose out of and in the course his employment and also found the provisions of K.S.A. 44-520 were violated with regard to the neck, shoulders and back injury as respondent was not provided notice within ten days of the accident and there was no just cause for failing to give said notice.

Claimant first alleges an injury to his right knee with an injury date of December 19, 1996 through March 1, 1997. Claimant acknowledges a preexisting condition which he claims was aggravated as a result of his work-related duties, including moving stock at respondent's place of business. The medical evidence placed in the record indicates that claimant had a long history of knee problems including surgery in March 1996 at which time he underwent an arthroscopic debridement and shaving of medial femoral condyle, a resection of redundant posterior cruciate ligament fibers, and a resection of the anterior scar and synovium covering the posterior root of the lateral meniscus. Claimant also had posterior cruciate ligament reconstruction on February 2, 1995.

Claimant had a history of knee problems as early as 1987, while in the Marines. At that time claimant suffered a posterior cruciate ligament tear and was treated conservatively. Claimant's condition, despite rehabilitation, continued to worsen leading to the later surgeries. Claimant acknowledged a history of ongoing symptomatology in his knee with increased pain. At times he would go to the Veterans Administration Hospital and request pain medication.

In January or February of 1997, claimant went to the Veterans Administration Hospital, at which time it was suggested, and claimant agreed that he be referred to the Kansas University Medical Center to be treated by Stephens W. Munns, M.D., the surgeon involved in both the 1995 and 1996 surgeries on claimant's knee. Claimant initially saw Dr. Munns in February 1997 and underwent his most recent knee surgery on March 13, 1997.

Claimant alleges he first advised his supervisor, Dan, the week prior to the March 13, 1997, surgery of his ongoing knee problems. He did not tell him at that time that moving boxes was what caused his problem, he simply advised him of ongoing difficulties and the possibility of the upcoming surgery.

The administrative law judge, in considering the long history of claimant's problems, found claimant's knee injury did not arise out of and in the course of his employment with respondent. A review of the evidence supports that finding and the administrative law judge's denial of benefits for claimant's ongoing knee problems for failing to prove accidental injury arising out of and in the course of his employment is affirmed.

Claimant further contends accidental injury on February 11, 1997, to his neck, upper back, shoulders and right arm. These injuries resulted from a lifting incident claimant alleges occurred on February 11, 1997, while moving wine bottles. The evidence indicates claimant did not advise respondent of this incident until he sought chiropractic treatment on February 28, 1997. K.S.A. 44-520 requires that notice be provided to respondent within ten days of the date of accident unless just cause can be shown for claimant's failure to provide notice, in which case claimant has seventy-five days from the date of accident to provide notice to respondent. In this instance, claimant provides no just cause for his failure to advise respondent within ten days of the February 11, 1997 incident.

A review of the medical evidence uncovers medical reports from various treating physicians; including John P. Gravino, D.O., Dennis C. Peterson, M.D., a radiologist; and Michael J. Schwartzman, D.O.; all of whom examined claimant between March 27, 1997, and April 9, 1997. The medical reports of all doctors indicate claimant's ongoing upper extremity, neck and back symptomatology stems from claimant's weight lifting and not from an accidental injury suffered with respondent. As such, the Appeals Board further finds claimant has failed to prove accidental injury arising out of and in the course of his employment for the alleged injuries to his neck, back and upper extremities.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Order by Administrative Law Judge Bryce D. Benedict, dated May 27, 1997, should be, and is hereby, affirmed and claimant is denied benefits for the injuries alleged.

IT IS SO ORDERED.

Dated this ____ day of August 1997.

BOARD MEMBER

c: Donald G. Strole, Lawrence, KS
Denise E. Tomasic, Kansas City, KS
Bryce D. Benedict, Administrative Law Judge
Philip S. Harness, Director